United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Original - Affidavit of Mailing

74-1410

To be argued by
PAUL B. BERGMAN

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United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 74-1410

P/S

UNITED STATES OF AMERICA,

Appellee,

—against—

ANDREW FUREY,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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Preliminary Statement

Andrew Furey appeals from a judgment of the United States District Court for the Eastern District of New York (Dooling, *J.*), entered March 8, 1974, finding him a juvenile delinquent in violation of Title 18, United States Code, Section 5031, upon the predicate crime of possessing opium with the intention to distribute it in violation of Title 21, United States Code, Section 841(a)(1). Appellant, 19 years old, was sentenced to a prison term to expire on his 21st birthday. He is currently released on bail pending appeal.

On this appeal, appellant contends that: (1) The prosecution was time barred by virtue of the Eastern District's Rule 50(b) Plan for Achieving Prompt Disposition of Criminal Cases; and, (2) certain documents were illegaley seized in his home and should have been suppressed. Appellant does not challenge the sufficiency of the evidence.

Statement of the Case

A. Facts

Sometime between December 5th and December 19th, 1972, appellant received the following letter from two of his brothers who were then living in Karachi, West Pakistan:

> "*Brian & Timmy blew it!! Don't you!!* Tuesday, Dec. 5, 1972.
>
> Dear Andrew,
>
> I hope you're home right now, to read this letter because there is something on the way for you. Today, here, is Tuesday. On Wednesday, tommorrow [sic], we will mail out 1 kilo of opium, in *one* parcel. It will say "candles" on it. It will have your name on it, with a false return name. As soon as you get this package, telegram to the American Embassy, c/o F. F., Karachi, West Pakistan, saying that you ["RECEIVED PARCEL"] that's all you need to say. It must be sent imediately [sic]. There will be no hash with it, so the price for this *first* parcel, (More if you come thru—plenty more) has to be $2000. As soon as you sell (generally 1 week) the K, cable the money by American Express, c/o F.F. Karachi. Send it in the form of traveler's checks, or whatever way they do it. You must come thru; we must receive $2000. There are 4 people involved, so don't fuck up. This is the big time. If you go and sell ¼ pounds for at least $400/each, you can sell 6 or 7, and make a couple hundred, and keep one or two ounces for your head. Any more would not be so cool, since opium is addictive!!
>
> Keep in touch, and good luck with all your *telegrams*.
>
> Bud & Ed"

[Emphasis in original] (Government Exhibit 1C; Government Appendix, A. 8).

On December 14, 1972, during a routine inspection of incoming overseas mail, inspectors came across a package which was addressed to appellant at 3 Jeffrey Lane, North Babylon, New York. The customs declaration accompanying the package stated its contents to be "Wax Candles" and the sender was described as "Father Francis" (Government Exhibits 4 and 5; Government's Appendix, A. 10, A. 11). A partial examination of the package's contents showed the presence of opium but no other drug * (see Laboratory Report, Government's Exhibit 6; Government's Appendix, A. 12). Thereafter, a controlled delivery of the package to appellant was arranged (30-43).**

The delivery, under surveillance, was made on December 19, 1972, at approximately 8:15 A.M., by a regular letter carrier for the U.S. Postal Service. At the same time that the delivery was made, a Customs Agent (William McMullan) was waiting at the United States Attorney's office in Westbury, New York, prepared to obtain a search warrant for the opium filled package (95). Immediately after the package was delivered, two of the surveilling agents (Corcoran and Schnakenberg) met with the letter carrier who stated that the package had been signed for and accepted by a person identifying himself as Andrew Furey. The carrier described appellant and gave the signed receipt to the agents (46-49; Government Exhibit 7; Government's Appendix, A. 13).

Approximately 15 minutes later, six agents approached appellant's home. Agents Schnakenberg and Corcoran stationed themselves at the front entrance while the remaining four took positions on the sides and back of the house. Corcoran and Schnakenberg then knocked at the

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* The Mail Violations Form showed the gross weight of the package to be 1¼ pounds (Government's Exhibit 2; Government's Appendix, A. 9).

** Numbers in parenthesis refer to the minutes of the suppression and juvenile delinquency hearing of January 2 and 3, 1974.

front door. Appellant looked at the agents from a window adjoining the front door and then disappeared. After knocking at the door again, the agents identified themselves and opened the door, which was unlocked. They entered the house and found appellant's brother, Harold, in the living room (49-51; 64). Agent Corcoran remained with Harold Furey while Agent Schnakenberg proceeded upstairs and found appellant in his bedroom in the act of withdrawing his arm from an open window (105-106). Appellant was immediately placed under arrest by Schnakenberg.

At the same time that Schnakenberg was entering appellant's bedroom, Agent George Heavey, who was stationed next to the house, heard a window of appellant's bedroom slide open and saw "a hand sticking out the window dropping a package" (129). The package, quickly recovered by Heavey, consisted of two slabs of narcotics (crude opium and hashish) wrapped in plastic. One end of the wrapping was open and "two brown slabs were sticking out . . ." (130). One of the slabs was broken and appeared to be missing a small piece (132). Agent Heavey then went into the house with the narcotics.*

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* Appellant subsequently acknowledged to Agent Heavey that he had thrown the package from the window during the following conversation with Heavey:

> A. I asked the defendant Andrew Furey if he threw the package out the window, again. He said yes, "I did."
> I said, "Where did you get the package?"
> He said, "I received it from the mail."
> I said, "Did you sign for the package?"
> He said, "Yes, I did."
> I said, "Did you know what was in the package?"
> He said, "Yes, I do."
> I said, "What was it?"
> He said, "It was opium and hashish."
> I said, "Are you sure there was hashish?
> He said yes.

[Footnote continued on following page]

At about 11:30 A.M., Agent McMullan arrived on the scene with a search warrant signed by Judge Travia (101,

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I said, "Our lab report said that it was opium."

He said, "No, there was hashish in the package, too."

I said, "There appears to be a piece missing here. Do you know where it is?"

He said, "Yes, I do."

I said, "Where is it?"

He said, "I ate it."

I said, "When did you eat it?"

He said, "After I opened the package."

I said, "But I thought you smoked opium."

He said, "No, I ate it and I took some Tang, or orange juice, with it."

I said, "How are you feeling?"

He said, "Fine."

* * * * *

I asked him again, "Are you sure you feel all right? You're not high or anything from the effect of the opium?"

He said, "No, I feel fine."

I asked him if Harry, his brother, had had some.

He said no.

I said, "Was the package for you and for Harry also?"

He said, "No, the package was not for Harry. Harry is not involved in this. It's my package."

Q. Did you have any discussion with him about the quantity of narcotics which you had found? A. The quantity? Yes. I asked him how much was there.

He said, "I don't know for sure, but there appears to be a pound of hashish and a pound of opium."

This was about all.

Q. Did you have any discussion about the value of the narcotics? A. Yes. I said, "Andrew," I referred to him as Andrew—"this is a lot of narcotics for yourself." I said, "It's too much for yourself. What were you going to do with it? Were you going to sell it to anyone?"

He said, "No, I was going to give it to my friends."

I said, "This quantity is worth a considerable amount of money to give away to your friends."

He said, "Well, if I really needed money, perhaps I could sell some to someone" (139-141).

144; Government Exhibit 13; Appellant's Appendix, 4a).* Heavey then gathered together the packaging strewn on the floor of appellant's bedroom, various items of narcotics paraphernalia including a triple beam scale as well as small amounts of narcotics (144). Heavey's search, which included looking beneath the bed mattress and a search of appellant's bureau, also turned up the letter from appellant's brothers in West Pakistan (145; Government Exhibit 1C, Government's Appendix, A. 7-A. 8) and, also, a letter written by appellant to his brothers, but not sent (Government Exhibit 1A; Government's Appendix, A. 5-A. 6).

B. Procedural History:

The information charging appellant as a juvenile delinquent was filed on June 21, 1973, following appellant's consent before Judge Judd (see Minutes of June 21, 1973; Government's Appendix, A. 14-A. 19). The case was next called on December 13, 1973, at which time appellant's counsel orally (and the following day on written papers) moved for a dismissal pursuant to the Eastern District's Rule 50(b) Plan for Achieving Prompt Disposition of Criminal Cases.** On December 20th and 21st, a hearing on

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* Agent McMullan had been notified by telephone of the package's delivery at about 8:45 by one of the surveilling agents who, at the time, was already in appellant's home (95-96). McMullan was not informed of Agent Heavey's recovery of the narcotics and his supporting affidavit for the search warrant is barren of the information. During the nearly three hours that it took for McMullan to obtain and, thereafter, transport the search warrant to the premises, the agents secured the premises. Though appellant's mother, who was present throughout, signed a document consenting to a search of her home (see Government Exhibit 1; Government's Appendix, A. 4), the agents did not act upon it. It was decided to await the arrival of the warrant.

** The docket sheet (reproduced in Appellant's Appendix at 1a-2a) mistakenly shows that the December 13th appearance was before Judge Bartels. In fact, the appearance was before Judge Dooling.

appellant's motion was held before Judge Dooling. Following are Judge Dooling's findings:

> Defendant-juvenile moves to dismiss the proceeding for failure to bring the case to trial within six months of the arrest of the juvenile.
>
> On December 19, 1972, the defendant was arrested at his residence and on the same day was charged in a complaint signed by Joseph Corcoran, a special agent of the United States Bureau of Customs, with possessing with intent to distribute about one and one-quarter pounds of opium, a Schedule II narcotic drug controlled substance in violation of 21 U.S.C. § 841(a)(1). The offense of § 841(a)(1) is a felony punishable by a fine not in excess of $25,000.00 and imprisonment for a term not in excess of 15 years, plus, in any case in which a sentence of imprisonment is imposed under the section, a special additional parole term of not less than 3 years. Defendant was on the same day arraigned before Magistrate Brisach and was at first held to $10,000.00 bail to be furnished in the form of a surety bond, a bail amount reduced apparently on the following day to $5,000.00 to be given in the form of a surety bond. The defendant was released on that day or a day later upon giving the surety bond.
>
> The hearing evidence is clear that the Assistant United States Attorney was soon in touch with the defendant's uncle, James Furey, who is a lawyer, whose practice consists primarily of the trial of civil actions, but who also has had experience in trial in the state courts of criminal actions. Mr. James Furey had at the time no acquaintance with the provisions of the Federal Juvenile Delinquency Act, and it soon appeared that the defendant was a juvenile. Defendant was born on April 23, 1955.
>
> What occurred between the date of arraignment and the date, June 21, 1973, when the information

was filed upon the juvenile's consent is, most unfortunately, a matter of dispute. However, it is clear that it was made apparent that there were two ways of proceedings, *first,* proceeding against the defendant as an adult offender, which as a matter of law would require an express direction of the Attorney General (as distinguished from the United States Attorney), and, *second,* procedure against the defendant as a juvenile delinquent, which would require the consent of the defendant. The recollection of the Assistant United States Attorney is that the matter of which way to proceed was submitted to Washington, and the recollection of defense counsel is that, explicitly or implicitly, the Assistant United States Attorney gave defense counsel the impression that the Assistant United States Attorney was seeking authorization to proceed against the defendant as an adult.

In any event, it appears that it was not until February or early March that the matter of which way the Government would propose to proceed had been cleared with Washington; the determination was that the Attorney General would not direct procedure by an indictment if the defendant assented to juvenile procedure.

Again in this period, there may have been limited contact between counsel, and, again, their recollections are at variance. The Assistant United States Attorney's recollection is that he definitely got the impression that the proceeding would not be contested; counsel for the defense have the very different recollection that the United States Attorney would not accept a plea of any kind except guilty as charged. The Assistant United States Attorney's recollection is that he outlined the normal juvenile procedure in the district, which tends to obliterate the distinction between contested and uncontested juvenile pro-

ceedings since even where the juvenile and counsel indicate that there will not be a contest, a hearing is conducted to make sure, through an evidentiary showing, that the juvenile did in fact transgress the law. Defense counsel insists that he did not learn of these matters until December.

In any event on or about June 18, 1973, the Assistant United States Attorney sent a letter to defense counsel to the effect that the matter would be on for consent to proceed against the defendant as a juvenile on June 21, 1973, before the Honorable Orrin G. Judd. The practice under the Individual Assignment and Calendar Rules of the Eastern District is that the Miscellaneous Judge conducts juvenile consent procedures under 18 U.S.C. § 5033 and then keeps the case as assigned judge. See Rule 5(a)(10). Defense counsel insists that the letter of June 18, 1973, was the only notice he ever had of what was forthcoming, although such a letter might seem to presuppose enough earlier discussion to warrant the Assistant's expectation that there would be a consent. On the 21st of June the consent proceedings took place before Judge Judd. The information charging juvenile delinquency was filed on June 21 and to it was appended the defendant's consent to juvenile procedure.

The rule of the Eastern District is clear that juvenile cases must go before the Miscellaneous Judge for the execution of consent and the filing of the information which thereupon initiates the case and that, by exception, the juvenile cases are not randomly assigned as are all other cases but remain with the judge who supervised the taking of the consent; the general theory is that the importance of the consent procedure counsels the advisability of having the same judge continue with the case

throughout. For some inexplicable reason the case was not assigned to Judge Judd and exactly when it was randomly assigned is not clear. It was, however, before September 1, 1973, assigned to the undersigned.

For whatever reason, no Notice of Readiness was filed by the United States Attorney and the case was not called up for action by the undersigned. However, in October of 1973 the Assistant United States Attorney inquired of the undersigned about the status of the case, and an initial conference date satisfactory to counsel was set up for December 13th. On that date the defendant announced, and on December 14th filed, the present motion to dismiss for failure to comply with the rules respecting prompt disposition (Rule 50, and Plan for Achieving Prompt Disposition of Criminal Cases).

The Assistant United States Attorney has stated, and there is no reason to doubt, that the Government has at all times been ready for trial. The case appears to be one presenting no particular trial problems from the Government's point of view, its witnesses are available, and no trial problems have at any time been anticipated. There would be considerable difficulty here in finding that there was an adequate communication of explicit notice to the district judge that the case was ready for trial, and the omission to employ the usual form of Notice of Readiness leaves it quite uncertain whether that was done within six months after the Attorney General advised that he would not require that the defendant be proceeded against as an adult. However, the confusion over the assignment of the case away from the judge who took the consent in part excuses the failure of formal procedures, and an additional circumstance is that, again, there is no

reason to doubt that the Assistant United States Attorney believed that there would not be a consent even though the defense counsel believed that the Government was unprepared to make any concessions and was requiring a plea of guilty and that, therefore, the case would have to be tried in a full dress way. Such a misunderstanding is quite possible since, as the Assistant United States Attorney has pointed out as a witness in the case, it is difficult to tell whether a juvenile case is proceeding without contest or not; there is always an evidentiary hearing since the general federal practice, at least in the and there is always some interrogation by defense counsel. There is, again, ground for misunderstanding since the general federal practice, at least in the Eastern District, leaves no genuine room for negotiation over the disposition of a juvenile case. The very nature of a juvenile proceeding leaves nothing to negotiate about. 18 U.S.C. § 5034 does not distinguish underlying offenses; in a sense every juvenile case is identical whether the underlying charge is one, as in the present case, in which a fearful sentence may be imposed, or one (e.g., a Dyer Act Charge) in which a fairly limited sentence is the maximum sentence possible in the case of an adult.

No purposive delay by the Government has occurred. Inadvertence and administrative confusion compounded by clerical omissions on the parts of the Assistant United States Attorney, the undersigned and the Clerk's office have caused the delay. No advantage has accrued to the Government certainly from the delay. Marked advantage has accrued to the defendant, who, if found to be a delinquent cannot be committed beyond his 21st birthday; each moment of delay in hearing reduces the maximum term of the juvenile's commitment or probation

[Memorandum and Order of the District Court, Appellant's Appendix, 21a-29a].*

ARGUMENT

POINT I

There Was No Violation of the Six Month Readiness Rule.

Appellant contends that, because no notice of readiness was filed by the Government within six months of his arrest, the prosecution had to be terminated. Appellant urges that Judge Dooling mistakenly viewed the six month period between his arrest and the filing of the juvenile delinquency information as either an excludable period under the "exceptional circumstances" exclusion of Rule 5(h) of the Eastern District's Plan for Achieving Prompt Disposition of Criminal Cases (The "Plan") or, alternatively, as a period to be excluded altogether from the computation because appellant's consent to be treated as a juvenile delinquent caused the felony charge to completely lapse.

Bypassing, for the moment, the distinction drawn by Judge Dooling between juvenile and adult criminal proceedings in the context of the Plan it seems that, given its applicability, the requirements of the Plan were none-

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* In addition to the facts outlined in the above quoted portion of Judge Dooling's decision, the following should also be noted: On December 13, 1973, the Government orally advised the Court and counsel that it was ready and, on December 21, the Government filed its Notice of Readiness. In addition, at the hearing on December 21, appellant fully reaffirmed his consent, previously given in June, to be proceeded against as a juvenile delinquent rather than as an adult offender (Minutes of December 21, 1973, p. 44). On January 2, 1974, the date set for the hearing, appellant petitioned this Court for a writ of mandamus and moved for a stay of the prosecution (Furey v. Hon. John F. Dooling, Jr., Docket No. 74-1004). This Court (per Friendly, *J.*), denied the motion for the stay and accordingly dismissed the petition for mandamus relief as moot.

theless observed by the Government. Thus, even if the 12 month period between appellant's arrest (December 19, 1972) and the filing of the Government's notice of readiness (December 21, 1973) is viewed as one continuous period, it seems that the first six months of the period—the time preceding appellant's consent be treated as a juvenile—is an excludable period under either Rules 5(a), 5(d), or Rule 5(h) of the Plan.

Rule 5(a) of the Plan provides for a tolling of the readiness requirement during "[t]he period of delay while proceedings concerning the defendant are pending, including but not limited to proceedings for the determination of competency and the period during which he is competent to stand trial. . ." By virtue of the provisions in Title 18, United States Code, Sections 5032 and 5033, no felony prosecution could have been maintained against appellant absent either (1) an express direction of the Attorney General that he be so treated; or (2) appellant's refusal to consent to be treated as a juvenile. Congress has thus conferred upon juveniles a special status which, as a matter of terminology, must eventually be equated with their competency to stand trial either as an adult (at the Attorney General's direction) or as a juvenile (with their consent).

Thus, the delay occasioned during the first six months following appellant's arrest was solely due to his status as a juvenile. The United States Attorney had to be assured that appellant ought not be treated as an adult and appellant had to determine whether he wished to be treated as a juvenile. That process was fundamentally one of determining appellant's competency to face either criminal or juvenile charges. The process was finally resolved on June 21, 1973, when appellant consented to be treated as a juvenile (see Transcript of June 21, 1973; Government's Appendix, A. 14-A. 19). Certainly, within the context of the Plan's purposes, that period of time, which was two days in excess of the six months, can only be described as a "period of delay while proceedings concerning the defendant are pending" and, more particularly, a period

during which he was quite legally incompetent to stand trial as described in Rule 5(a) of the Plan.*

Though the Government believes that the "competency" exclusion in Rule 5(a) is the most sensibly applicable exclusion to be applied in this case, it would be remiss in its responsibilities were it not to discuss the near applicability of the exclusions provided for in Rules 5(d) and (h) of the Plan as well as the apparent interplay between these exclusions and the 5(a) exclusion.

Rule 5(d) of the Plan provides for a tolling of the six month readiness requirement where a defendant is "unavailable." A defendant is unavailable "whenever his location is known but his presence for trial cannot be obtained by due diligence." Rule 5(h) provides a blanket exclusion in those cases where the "period of delay [is] occasioned by exceptional circumstances." Obviously, the status matrix in the juvenile delinquency provisions breed the unavailability of a juvenile defendant at the same time that the process of determining the defendant's competency to face charges remains unresolved. During that period of time it may be said that appellant was "unavailable" until he consented to be treated as a juvenile.

The Government recognizes that the foregoing arguments respecting the applicability of express exclusions in the Plan partake of a kind of "pigeonhole" approach seemingly lamented upon by this Court in *United States* v. *Rollins*, 487 F.2d 409, 413 (2d Cir. 1973). There, the Court, recognizing that the rules were not to be considered as "necessarily mutually exclusive" (*id.*, at 413, n. 8), found sense in the blanket provision of "exceptional circumstances" in the antecedent to Rule 5(h) of the Plan.

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* Though more appropriately highlighted in the context of Judge Dooling's main rationale, it should be noted here that appellant did not raise the question of delay at the June 21st consent proceeding even though more than six months had passed since the arrest. That failure was implicit recognition that the delay until then was justified.

The Court remarked" "The focus should be on the delay and the reasons for it" (*id.*, at 413).

In *Rollins*, this Court found exceptional circumstances justifying the delay where the Government's witness, an agent, was himself under investigation and the Government believed that if he were to be prematurely called as a witness the case would be undermined. Judge Oakes stated as follows (487 F.2d at 413-414):

> The public interest in prompt disposition of criminal cases is the touchstone of the Rules. In determining whether facts present circumstances exceptional enough to merit an extension of time, the public interest in prompt adjudication must be balanced against competing interests. Here the delay occasioned by the secret investigation of the officer/witness furthered the public interest in full investigation of police corruption, a serious problem in New York City [footnote omitted]. Had the case been brought to trial while the investigation was in process, and had the defense cross-examined the witness concerning his alleged misconduct, the investigation would have been frustrated. In such a situation we think the balance tips in favor of a finding of "exceptional circumstances" to bring this case within rule 5(h).

In the case at bar, there is no suggestion of purposeful delay by the Government. For the most part, the delay between the arrest and the consent was occasioned by the need to resolve, pursuant to the mandate of Congress, the status of appellant. The speed of the prosecution was certainly not uppermost. Rather, Congress' concern for the thoughtful treatment of juvenile offenders was paramount. And, though the process of resolution was somewhat fitfully carried out, the end result—appellant's consent—was then, as now, wholly acceptable to appellant.* It would

* At the December 21, 1973 hearing appellant reaffirmed his consent to be treated as a juvenile (Transcript of December 21, 1973 hearing, p. 44) and during his testimony, appellant's counsel, who is also his uncle, agreed that it was to appellant's benefit to be treated as a juvenile, rather than as an adult (*id.*, at 108).

seem that the combined interest of all the parties in securing the mutually well informed treatment of juvenile defendants, necessarily a time consuming process, outweighs the need for alacrity. In those circumstances, the Government believes that "the balance tips in favor of a finding of 'exceptional circumstances'. . ." *United States* v. *Rollins, supra,* at 414.*

The seemingly imperfect application of the Plan's provisions to the first six months of the instant prosecution, if not the entire prosecution, by itself suggests that Judge Dooling's approach is, by far, the more sensible. In recognizing the significant distinctions between juvenile and adult proceedings, the District Court concluded that the time between the arrest and the noting of the Government's readiness could not be treated, for the purposes of the Plan, as a single, continuous prosecution. Therefore, the District Court stated:

> In the present case the felony complaint upon which the defendant was arrested has completely lapsed. No indictment followed upon it. Once the defendant, by his consent, permitted the juvenile proceedings to go forward, the risk of indictment for the felony, and exposure to the fearful punishment that attaches to it, were totally removed. The felony charge was disposed of on June 21st, and a new and very different case addressed to a different aim was then initiated (Memorandum and

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* Under Rule 4 of the Plan, the District Court is required to dismiss an indictment where it finds none of the exceptions in Rule 5 applicable, "unless the Court finds that the Government's neglect is excusable, in which event the dismissal shall not be effective if the Government is ready to proceed to trial within 10 days." In the case at bar, the hearing was held within a week of Judge Dooling's order denying appellant's motion and, while the District Court did not treat the foregoing proviso in the Plan, it seems clear that whatever "neglect" might be attributed to the Government it was nonetheless excusable.

Order of the District Court; Appellant's Appendix, p. 31a).*

Appellant speciously argues that "[i]t is ironic that should this decision remain undisturbed, we find this boy facing two (2) years of imprisonment where if he were an adult he would be released" (Appellant's Brief, p. 4). The short answer to appellant's argument is that, had he wished to avoid that "irony", he need simply have withdrawn his consent and elected to be treated as an adult, Instead, he chose to avoid the "fearful sentence" he would face as an adult criminal. In addition, had appellant been treated as an adult, the prosecution would not have been saddled with the need to obtain appellant's consent nor the need to ferry counsel through the intricacies of juvenile proceedings; the very source of the "misunderstanding" and delay (Memorandum and Order of the District Court, Appellant's Appendix, 27a) that so enveloped the early stages of the case.

POINT II

The Search was Proper.

Appellant contends that Agent Heavey's recovery of the narcotics thrown from the house by appellant precluded the need to search further.*

The same contention was made before the District Court. Reviewing the facts adduced, Judge Dooling rejected it,

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* Because the Government's notice of readiness was filed within six months of the start of the juvenile proceedings, the District Court did not consider whether the Plan was applicable even upon the filing of the juvenile delinquency information. Thus, Judge Dooling remarked: "The case is one in which, *if it is within Rule 4 of the Plan . . .*" (Emphasis added) (Memorandum and Order of the District Court; Appellant's Appendix, 29a).

* Alternatively, appellant sallies forth the argument that the search had already been completed, if not prior to the actual signing of the warrant (10:30 A.M.), certainly prior to its arrival. Judge Dooling, however, rejected the suggestion that Agent Heavey was not to be believed and credited his testimony that he waited for the warrant before commencing the search (187-191).

finding that the agents were not bound to believe that they had found the package which had been delivered or that, having found the package, they were bound to halt short of assuring themselves that they had retrieved its entire contents (192-195). Thus, because the earlier laboratory test had shown the presence only of opium in the package, the presence additionally of a hashish slab in the package recovered by Agent Heavey could reasonably have led the agents to believe that the initial object of thir search was still about and still intact.** In addition, the agents could properly have searched for the chunk of opium obviously missing from the slab they had already found despite appellant's assurances to them that he had eaten a piece of it prior to their entrance into the house. In sum, despite the hindsight assessment that the agents may, in all probability, had already found the entire remaining contents of the "Wax Candles" package, they were still permitted to execute the warrant fully and scrupulously. Compare, *United States* v. *Highfill*, 334 F. Supp. 700 (D.C. Ark., 1971); *United States* v. *Feldman*, 366 F. Supp. 35[illegible] (D.C. Hawaii, 1973).

The Governm[illegible] would further submit that the search conducted by Agent Heavey of appellant's bureau was justified on the basis of appellant's mother's consent. The testimony at the hearing on the motion to suppress showed that, prior to signing the consent to search, Mrs. Furey had been advised of the fact that anything found as a result of the search could be used against her. She was further advised that she had the right to an attorney, and that she could refuse to give the agents consent (51-52). Upon stating

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** In his brief, (p. 9), appellant urges this Court to find that the warrant was the product of a fraud because the agents had, he argues, already found the drugs. While it is true that the District Court determined that the narcotics were found before Agent McMullan (the agent in Westbury) was notified (185), the evidence shows that McMullan was never told that narcotics had been found (100-101). It would seem, certainly, that had the agents subjectively believed that they had uncovered the opium that had been delivered, they would have told that to McMullan; if only because of the memorable way in which it was found and, more likely, to avoid the necessity of needlessly extending their occupation of the house.

that she understood her rights as given, Mrs. Furey signed a consent to search (52-53, 74-75; Government Exhibit 1; Government's Appendix, A. 4). Throughout this period of time, Mrs. Furey appeared to be very calm (69). The record also demonstrates that Mrs. Furey was not under arrest.

It seems clear that a mother has the authority to consent to a search of her son's bedroom and thereby bind the son to the consent given. *United States ex. rel. Combs* v. *LaVallee,* 417 F.2d 523 (2d Cir. 1969), *cert. denied,* 397 U.S. 1002 (1970); *Frazier* v. *Cupp,* 394 U.S. 731, 740 (1969). In the *Combs* case, the consent search was upheld even though no Fourth Amendment warnings were given. See, *Schneckloth* v. *Bustamonte,* 412 U.S. 218 (1973). Certainly, the facts presented herein in no way represent an instance of submission to official authority under circumstances pregnant with coercion. See, *United States* v. *Mapp,* 476 F.2d 67 (2d Cir. 1973). The Government submits that the facts demonstrate that Mrs. Furey intelligently and voluntarily consented to the search conducted.*

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* The Government would note that, should this Court determine that the letters should have been suppressed, the evidence of appellant's guilt apart from letters was sufficient to warrant the application of the harmless error rule. See, *Chapman* v. *California,* 386 U.S. 18 (1967). At bar, appellant's guilt was adequately shown by the circumstances surrounding the delivery of the package, his actual possession and use of the contents and his statements to Agent Heavey; the evidence most heavily relied upon by the District Court in finding appellant a juvenile delinquent (205-209).

CONCLUSION

The judgment of the District Court should be affirmed.

May 28, 1974

Respectfully submitted,
DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

RAYMOND J. DEARIE,
PAUL B. BERGMAN,
DAVID A. DEPETRIS,
Assistant United States Attorneys,
of Counsel.

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SIR:

PLEASE TAKE NOTICE that the within will be presented for **settlement and signature** to the Clerk of the United States District Court in his office at the U. S. Courthouse, 225 Cadman Plaza East, Brooklyn, New York, on the ____ day of ____________, 19____, at 10:30 o'clock in the forenoon.

Dated: Brooklyn, New York,

__________________________, 19____

____
United States Attorney,
Attorney for ______________

To:

____

____

____

Attorney for ______________________

SIR:

PLEASE TAKE NOTICE that the within is a true copy of ____________ duly **entered** herein on the ____ day of ____________, in the office of the Clerk of the U. S. District Court for the Eastern District of New York,

Dated: Brooklyn, New York,

__________________________, 19____

____
United States Attorney,
Attorney for ______________

To:

____

____

____

Attorney for ______________________

__________ Action No. __________

UNITED STATES DISTRICT COURT
Eastern District of New York

____

—Against—

____

____

____
United States Attorney,
Attorney for ______________
Office and P. O. Address,
U. S. Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Due service of a copy of the within __________ is hereby admitted.

Dated: ______________________, 19____

____
Attorney for ______________

____

FPI-LC-5M-8-73-7355

Form No. USA-52a-6a
(Rev. 1-29-71)

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

DEBORAH J. AMUNDSEN, being duly sworn, says that on the 28th day of May 1974, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a two copies of appendix and brief of the appellee of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Furey & Mooney, Esqs.
600 Front Street
Hempstead, N. Y. 11550

Sworn to before me this
28th day of May 1974

Frances A. Grant
FRANCES A. GRANT
Notary Public, State of New York
No. 41-4583731
Qualified in Queens County
Commission Expires March 30, 1975

DEBORAH J. AMUNDSEN